NOT REPORTABLE – 3 SEPTEMBER 2002

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

In the application of	Case number 4745/02
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Applicant
versus	
DAVID CUNNIGHAM KING	First Respondent
BEN NEVIS HOLDINGS LTD	Second Respondent
METLIKA HOLDINGS LTD	Third Respondent
LADINA JEAN WYLDE KING	Fourth Respondent
AGNES CUNNIGHAM KING	Fifth Respondent
TALACAR HOLDINGS (PTY) LTD	Sixth Respondent
GAIUS ATTICUS (PTY) LTD	Seventh Respondent
GLENHURST WINE FARM (PTY) LTD	Eighth Respondent
QUOIN ROCK VINEYARDS (PTY) LTD	Ninth Respondent
8 NICHOLSON ROAD (PTY) LTD t/a GARY PLAYER STUD FARM	Tenth Respondent
HAWKER AIR SERVICES (PTY) LTD	Eleventh Respondent
BOTHMASBURG FARMING (PTY) LTD	Twelfth Respondent
S J BOTHMA BOERDERY (EDMS) BPK	Thirteenth Respondent
AMAZULU FOOTBALL CLUB (PTY) LTD	Fourteenth Respondent
BLAIR ATHOLL FARM (PTY) LTD	Fifteenth Respondent

JUDGMENT

HARTZENBERG J:

(1) Scotsmen are known to be thrifty. The first respondent is a Scot. He cannot be accused of squandering his money on the unnecessary payment of income tax. At present there are various applications, counter-applications and objections before the court, all postponed to this week to be dealt with in one court as they are all interrelated. The most important of the matters are an interim interdict against the first and 14 other respondents and a provisional sequestration order against the estate of the first respondent.

(2) The first respondent was born in 1955 as the fifth of seven children. His father was a policeman. He became permanently resident in this country during the seventies. His income tax returns for the period 1990 until 2001 reflected a modest income of the order of R60 000 per year. He is an able advisor in the field of investment. He has developed software for those purposes. Mainly through his efforts a company was listed on the Johannesburg Stock Echange. The company is named Specialized Outsourcing Ltd. The progress of the shares was an all time record, success story. 70% of the shares were owned by a company, Ben Nevis Ltd. (*Ben Nevis*), situated in St. Helier in Guernsey in the British Virgin Islands. The first respondent represented Ben Nevis in South Africa.

(3) During the period 1998 -2001 Specialized Outsourcing shares were sold, mainly through the first respondent, for a profit in excess of R1 200 million. About the same time the first respondent began to have the enjoyment of a number of very expensive luxuries. Amongst others there was the family home in Sandhurst, built upon three contiguous properties, acquired at a total price of R14,95 million and thereafter demolished and rebuilt according to

taste, the holiday home in Plettenberg Bay, acquired at a total price of R8 million, a wine farm in the Western Cape, acquired at a price of R20 million, and vineyards situated some distance from there, to supplement the production of grapes on the wine farm, a Ferrari 550 Maranello bought for R2,1 million, a Mercedes Benz S500, bought for R819 000, a Hawker 800 XP aircraft purchased for $12,2 million and a half share in the stud farm of Mr. Gary Player involving amounts of R10 million and R3 million. He also had the benefit of a game farm in the Lydenburg region previously acquired.

(4) It is alleged that there was a report in the press on 5 March 2000 to the effect that the first respondent made a R1 billion profit on the sale of Specialized Outsourcing shares. It sparked off investigations into the tax affairs of the first respondent. A Mr. Chipps of the applicant's office directed questions at the first respondent and scrutinised his replies thereto. Eventually the applicant applied to this court for the appointment of adv. Marais SC as a presiding officer in terms of section 74C of the Income Tax Act, no. 58 of 1962 (*the Act*). He presided at an inquiry which took place over a three day period as from 28 January 2002. The first respondent was interrogated. The applicant was responsible for the keeping of a record. At the conclusion of the interrogation it was agreed that further information would be supplied by the first respondent and that further questions could be directed to the first respondent in writing after the record had been studied. There was a distinct possibility of a continuation of the *viva voce* inquiry at a later stage. This aspect will be discussed later.

(5) The first respondent's written answers to the applicant's initial questions and his evidence at the inquiry led the applicant to allege that the first respondent grossly under declared his income for income tax purposes during the period 1990 until 2001. The argument is that the profit on the sale of the shares which initially vested in the applicant and were later on transferred to Ben Nevis, constitutes taxable income. The applicant further contends that the

share holding and loan accounts in the 6th respondent and some of the other respondents are the property of the first respondent and that the applicant ought to be entitled to execute against those assets in respect of the tax, which the first respondent is obliged to pay.

(6) Apart from the first respondent and Ben Nevis, the second respondent, the other persons and entities involved are the following:

(i) Metlika Holdings Ltd.(*Metlika)* an international business company, incorporated in the British Virgin Islands, the third respondent. It is alleged to have recently (when is became apparent that the applicant had designs to tax the first respondent and Ben Nevis on the abovementioned profits) taken over the South African assets, previously held in the name of Ben Nevis.

(ii) The first respondent's wife, the fourth respondent, who is alleged to have operated a bank account in excess of R1 million from off-shore sources, presumably Ben Nevis.

(iii) The first respondent's mother, Mrs. Agnes King, the fifth respondent, who resides in Dunbartonshire, Scotland. According to the first respondent she has the majority share-holding in Ben Nevis and is also involved in Metlika. The first respondent has a power of attorney to act on her behalf in South Africa.

(iv) Talacar Holdings (Pty.) Ltd. (*Talacar*), the 6th respondent. It was incorporated earlier, under a different name, but on 2 November 1998 its name was changed to Ben Nevis Holdings (Pty) Ltd and on 6 September 1999 to its present name. Ben Nevis held all the shares in Talacar. The applicant calculates that Ben Nevis had a loan account in Talacar in an amount of R192 128 261 as on 28 February 2001. It is the registered owner of the family home in Sandhurst, a property at Fancourt and the house occupied by the first respondent's parents-in-law in Plettenberg Bay. It is also a 100% share-holder in the seventh respondent, the ninth respondent and the tenth respondent and is alleged to have loan accounts totalling R135 million in the seventh-,

eighth-, tenth-, eleventh- and fifteenth respondents. The abovementioned Ferrari and Mercedes S500, after having been registered in the name of the first respondent, are together with three other vehicles registered in its name. The alleged value of the vehicles is R4,4 million.

(v) Gaius Atticus (Pty) Ltd (*Gaius Atticus*), the seventh respondent, was converted from a close corporation to a private company, on 26 October 1998 and the first respondent became the sole director thereof on 13 November 1998. The holiday home in Plettenberg Bay, which was erected on two adjoining even after the demolition of the then existing improvements, is registered in its name.

(vi) Glenhurst Wine Farm(Pty) Ltd (*Glenhurst*), the eighth respondent, owns a wine farm in Simonsberg, Stellenbosch. The first respondent became its sole director on 9 November 1998.

(vii) Quion Rock Vineyards (Pty) Ltd (*Boskloof)*, the ninth respondent, has the first respondent as sole director and produces grapes which are supplied to the winery at Glenhurst. The shares and loan account in it was bought by Talacar for R6,5 million and Talacar's present loan account in it is approximately R10 million.

(viii) 8 Nicholson Road (Pty) Ltd t/a Gary Player Stud Farm (*Gary Player Stud Farm*), the tenth respondent, farms at Colesberg. Its directors are the first respondent, Mr. Player and a Mr. Murdoch. Talacar holds 49% of the shares in it and has a loan account of approximately R6 million. The loan account was initially in the name of the first respondent.

(ix) Hawker Air Service (Pty) Ltd (*Hawker Air Service*), the eleventh respondent, was the registered owner of the Hawker 800XP aircraft, which was exported to the USA on 12 January 2001. Presently a Falcon 900 aircraft, registration number ZS-DAV, is registered in its name. It is alleged to be worth approximately R175 million.

(x) Bothmasburg Farming (Pty) Ltd (*Bothmasburg Farming*), the twelfth respondent, is a wholly owned subsidiary of Ben Nevis and the owner of a game farm in Mpumalanga and of all the shares in a company, the thirteenth respondent, which owns the adjoining farm. As at 28 February 1999 the first respondent had a loan account of R993 100 in it.

(xi) S J Bothma Boerdery (Pty) Ltd (*S J Bothma Boerdery)* is the thirteenth respondent. The cost price of the farm registered in its name was R5,5 million. The first respondent's loan account as at 18 March 1999 was R4,9 million. According to the 2000 financial statements, signed in November 2001, the loan account was taken over by Metlika at an unspecified date.

(xii) Amazulu Football Club (Pty) Ltd (*Amazulu Football Club),* the fourteenth respondent, was allegedly, according to a report in a newspaper, bought by the first respondent for R20 million. It was sold and the purchase price of R2,75 million was paid into Talacar on 15 February 2002.

(xiii) Blair Atholl Farm (Pty) Ltd, (*Blair Atholl Farm),* is the fifteenth respondent. Its directors are Mr. Gary Player, Mr. Marc Player and Mr. Scott Douglas. It is a property owning company and derives income from rental. Ben Nevis bought a 50% interest in it for R10 million. According to an affidavit by Mr. Chipps it was still the registered share-holder as during February 2002.

(7) On the 18th February 2002 the applicant urgently, without notice to any of the respondents, applied for an order to attach *ad fundandam jurisdictionem* the assets of Ben Nevis and Metlika of which it was aware, for a *rule nisi* interdicting the South African based respondents from alienating, encumbering etc. its assets, pending the outcome of an action to be instituted by the applicant for the piercing of the corporate veil between the first, second and third respondents and a declaratory order to the effect that the assets of Ben Nevis and

Metlika, *per se* and held in some of the other respondents, are executable for the satisfaction of the Applicant's claims against the first respondent for R912 813 992 and against Ben Nevis for R1 467 844 330. The applicant asked for sanction of a provision that the respondents could apply to it, or to the court, for consent to relax the provisions of the interdict, which consent was not to be withheld unreasonably. The applicant further applied to institute the proposed action against Ben Nevis and Metlika by way of edictal citation and for the normal relief in respect of service and entry of appearance.

(8) It was alleged in the papers that it was apparent that the first respondent was involved in the transfer of assets out of his name and from entities into different entities. One of the erves on which the family home was built was for example initially registered in the personal name of the first respondent but was thereafter transferred into the name of Talacar. Likewise were the Ferrari and the Mercedes S500 transferred out of the name of the first respondent into the name of Talacar. It was further alleged that the transfer of assets out of Ben Nevis into the name of Metlika only started to occur after Mr. Chipps started asking annoying questions. It was further alleged that the R2,75 million received for the sale of Amazulu Soccer Club could within minutes be transferred out of the country. It was pointed out that the first respondent's attitude is that the profit on the sale of the Specialized Outsourcing shares is a capital gain and not taxable and in any event that it was derived off-shore by a foreign entity. As to his living expenses, provided by Ben Nevis, it is his contention that it is remuneration for work done for Ben Nevis off-shore. His evidence is to the effect that he deliberately asked Ben Nevis only to remunerate him for work done off-shore. It is the applicant's case that those contentions are not correct and that the first respondent is to be taxed on moneys paid by Ben Nevis to support his lavish lifestyle and also on moneys invested in South Africa in assets which are utilised by the first respondent. Moreover it is the applicant's case that Ben Nevis

earned the profit on the sale of the shares in this country and that that profit is also taxable here.

(9) It is clear that the first respondent, although living like a monarch in absolute luxury, claims to have no assets in the country and that he deliberately arranged his affairs not to own assets in the country. According to the information supplied by him his estate is not worth more than R550 000. He asked to be deregistered as a tax-payer. Part 16 of an income tax return form requires of the tax-payer to list credits and accruals which he considers not taxable. In his return for 2001 the first respondent listed "Liblife policies of R58 332, investments" of R50 855 and dividends of R2 648. What is conspicuous in its absence is the amount of R3 661 664 which, at the inquiry, he stated to have been his living expenses, paid by Ben Nevis, for that year. The form was filled out at a stage when the first respondent was fully aware that the applicant wants to tax him on living expenses. There can be little doubt that the living expenses were omitted from that form deliberately because the first respondent knew that if he disclosed it he would be taxed thereon or at least would be asked to explain the origin thereof. What irked the applicant no little was that the applicant was reported in the media to have claimed to be a serial entrepreneur and a wealthy man who would not pay tax and would fight the applicant to the end.

(10) The information supplied by the first respondent about both Ben Nevis and Metlika is extremely vague. His mother is involved therein but who exactly are the shareholders is just not ascertainable. Then there is the preposterous allegation that he did not want to know who the other interested parties are. His answers as to who manages the affairs of Ben Nevis are also vague and it is difficult not to suspect that it is he, himself who does so. It is also impossible to ascertain what exactly the agreement between him and Ben Nevis is and what the agreement, if any, between him and Metlika is.

(11) The applicant alleged that it issued additional assessments against the first respondent in the amount of R912 813 992 and against Ben Nevis in the amount of R1 467 844 330 but had not delivered it yet. It expressed a fear that the first respondent would dissipate its assets, especially if the applicant's plan to tax the first respondent would become known and referred to statements by the first respondent that Ben Nevis intended to dis-invest in this country. An order as prayed for was granted on an urgent basis by De Klerk J on 18 February. On that day the first respondent complained that the record of the inquiry was defective. Also on that date Marais SC furnished the applicant with an *interim* report. The first respondent was not aware of it and only became aware thereof much later.

(12) Thereafter all hell broke loose. The two assessments were served on 19 February. The due date was 19 February. On 12 March reasons for the assessments were sought in terms of section 5 of the Promotion of Administrative Justice Act, 3 of 2000. On 12 March also the applicant furnished reasons but, in fairness to the first respondent, it must be pointed out that, on his behalf, the reasons are referred to as no more than an attempt to furnish reasons. On 15 March notice of an objection to the assessments was given. There was also a request for a deferment of payment. Furthermore there was a tender to pay income tax "at the prescribed rate" on the living expenses for the period 1998-2001. It reads as follows:

> *"During 1998 and as Ben Nevis's authorised representative, our client had successfully procured significant profits for the investors in Ben Nevis. Accordingly, at that stage, Ben Nevis became prepared to make available significantly increased sums to support our client's lifestyle.*

Without prejudice to our client's contention that he is not liable to tax on the value of the living expenses, our client has instructed us to confirm that he is prepared to accept that the amounts of R1 761 714,00; R2 202 142; R2 752 678 and R3 661 664 in respect of the 1998 to 2001 years of assessment respectively, may be deemed to be included in our client's gross income. Our client tenders to pay income tax at the prescribed rate in respect of such amounts."

On behalf of the applicant it was contended that that was an unconditional admission by the first respondent that he ought to have disclosed those amounts in his tax return and that he was liable to be taxed thereon. It was contended that it follows that the first respondent cannot but admit that he was correctly assessed with a 200% penalty in terms of section 76(1)(c) of the Act and interest in terms of section 89 *quat* of the Act. Reliance was placed on paragraph 16.1.3 of the objection which reads:

"In so far as our client committed any act or omission referred to in paragraphs (a), (b) or (c) of section 76(1), the Commissioner should have remitted the additional tax as: save for the omissions in respect of his living expenses for the years 1998 to 2001, the omissions from our client=s returns did not affect the amount of the tax for which our client was properly chargeable."

(13) On 18 March there was a request for access to SARS' information and documentation. On 26 March SARS denied that there were defects in the record and the first respondent's answering affidavit was filed. On 27 March Talacar brought an urgent application in the *ex parte* application to withdraw the R2,75 million in its bank account. No order was made. On 12 April SARS requested further information to give a ruling in respect of the objection and declined deferment on the amount of over R16 million in the assessment of the first

respondent pertaining to the aforementioned living expenses. (The prescribed tax on the living expenses came to over R4,3 million but the 200% penalty and the interest increased the tax actually payable to "R16,4 million.). The return day of the rule in the *ex parte* application was extended until 26 August, on 16 April by Stafford DJP. On 24 April there was a further request for information and documentation by the first respondent.

(14) There was a resumption of the section 74 C inquiry on 29 April and Marais SC indicated that the record was defective. The next day a settlement of Talacar's application was made an order of court. The actual agreement professes "to replace part of the *ex parte* order with a suitable guarantee". It records that Metlika agrees to be bound by the agreement and that it will provide the applicant with a guarantee in the amount of R70 million. On delivery of the guarantee the attached shareholdings, loan accounts and assets in Glenhurst and Quoin Rock and the remaining portion of the R2,75 million in an account of Talacar's, received from the sale of the Amazulu Football Club (the aforesaid assets) were to be released. A valuation of the aforesaid assets and all further shares and loan accounts attached in terms of the *ex parte* order except for the assets of the first respondent and his wife in Hawker Air Services, 8 Nicholson Road and Blair Athol Farm (the additional assets) was to be done as at 30 April 2002. Once the value of the aforesaid assets and the additional assets had been established the additional assets were also to be released against a suitable guarantee. The remaining underlying assets, subject to the interdict and included in the valuation, except for the underlying assets of Hawker Air Services, 8 Nicholson Road and Blair Atholl Farm, were also to be released against the substitute guarantee. The guarantee becomes payable if the court issues a declaratory order to the effect that the assets would have been executable and it is established that there is a tax debt owing by the first respondent and/or Ben Nevis. It was further provided that the order against the first respondent and his wife in respect of Hawker

Air Services, 8 Nicholson Road and Blair Atholl Farm was to remain in place pending the finalization of the *ex parte* application.

(15) On 2 May there was further disclosure of documentation by the applicant and the applicant insisted on payment of the R16 million. The first respondent launched a review application in case no. 12508/02 against the applicant on 7 May. It was for an order interdicting the applicant from filing a statement in terms of section 91(1)(b) of the Act, pending the review, which would elevate the portion of the assessment of R16 million in respect of the aforesaid living expenses to the status of a judgment which would become unassailable in terms of section 92 of the Act in civil proceedings. The application was brought because the first respondent feared that the applicant would file such a statement and on the strength thereof would apply for his sequestration. The application was opposed and answering, replying and duplicating affidavits were exchanged. On 11 May the first respondent's passport was seized at Lanseria Airport. The matter was argued on 13 May before De Vos J and dismissed on 14 May. On 15 May a section 91(1)(b) certificate was filed in respect of the R16 million assessment and on 24 May the application for sequestration was brought in case number 14280/02. Despite opposition the estate of the first respondent was provisionally sequestrated on 7 June by order of Shongwe J. Before the order was made the first respondent made payment to the applicant of the R4,3 million which was taxed according to the rate prescribed in the act.

(16) One de Beer was appointed as a provisional trustee on 10 June. On that day the first respondent filed an application for leave to appeal against the provisional sequestration order and for a certificate in terms of Rule 18 of the Constitutional Court Rules. That was followed on 12 June by an application by the applicant in terms of Rule 30 for the setting aside of the application for leave to appeal. On 19 June the first respondent filed an affidavit in the review

application, applying for the removal of Marais SC as presiding officer in the section 74C inquiry. The basis of the application is bias on the side of Marais SC. The first respondent relies on the fact that he had a consultation with an attorney, Ms Dreyer, in the office of the State Attorney before the application for his appointment was brought, that he supplied the *interim* report without the consent and knowledge of the first respondent, that he made adverse findings in the report and that the State Attorney acted on the suggestions made in the report.

(17) De Beer brought an urgent application in case number 17091/02 on 24 June against the first respondent and the applicant for an order directing the first respondent to have an audience with him, to assist him to collect and take charge of the assets of the insolvent estate and to render the co-operation imposed on an insolvent in terms of the Insolvency Act, No. 24 of 1936. Apart from the answering and replying affidavits in that application a number of further steps were taken. The first respondent applied to join the Minister of Justice (In order to attack the constitutionality of section 150(5) of the Insolvency Act.) and both de Beer and the Minister replied thereto. The matter was set down as an urgent application on 9 July but was postponed by Swart J until 26 August.

(18) Marais SC filed two affidavits in the review application respectively on 10 July and 8 August. A summons to pierce the corporate veil by the applicant against the first respondent, Ben Nevis and Metlika was issued on 31 July. De Vos J granted leave to appeal against her dismissal of the first respondent's urgent application to interdict the applicant to file a section 91(1)(b) certificate on 2 August, whereupon a notice of appeal was filed.. On 12 August the first respondent and his wife brought an application for the postponement the return day of the *rule nisi* in the *ex parte* application pending finalisation of the review application (matter number 12508/02). On 12 and 13 August affidavits were filed on behalf of Talacar, Gary

Player Stud Farm and Blair Atholl Farm complaining about the effect of the interdict on the third parties involved and the applicant's refusal to allow ordinary commercial activity without his consent and unless security is furnished. It must further be pointed out that one Mahlangu was appointed as a co-trustee with De Beer at a stage before his application was launched, that the first respondent questioned De Beer's authority to bring the application and that there was an indication that there would be an application for the joinder of Mahlangu.

(19) Before the matter commenced in court I informed counsel that I had seen that the first respondent questions the conduct of Marais SC and of the applicant. I disclosed to counsel that Marais SC is related to me through his marriage to a relative of mine and that we have a long social association. I invited counsel to request me not to hear the matter. Shortly thereafter I was asked, to my astonishment, not to mention disappointment, to hear the matter and told that counsel agreed that I would not be asked to adjudicate upon that issue. Save to point out that in the *interim* report Marais SC expresses the legal opinion that it will be extremely difficult if not impossible for the applicant to execute against the assets of the first respondent and Ben Nevis outside the country, I shall not refer to the issue any further. To my further astonishment there were no fewer than twelve members of the bar involved in this application.

(20) In respect of the *ex parte* application, which the applicant calls a "preservation interdict"[1] the applicant asked me to confirm the rule *nisi* as modified by the agreement between the parties. The first respondent and his wife and the entities controlled by him and Ben Nevis and Metlika asked me to set the rule aside. Mr. Van der Nest on behalf of Talacar, Gary Player Stud Farm and Blair Atholl Farm asked me not to confirm the rule in a manner which would

[1] See the comments of E M Grosskopf JA in *Knox D=Arcy and Others v Jamieson and Others,* 1996(4) S A 348(A) at 371J-372D about the question of a suitable name for the remedy..

in any way hamper the ordinary activities of Gary Player Stud Farm and of Blair Atholl Farm and would restrict the powers of the third parties involved in those entities to regulate their own affairs. He asked for an order for costs against the applicant. He also criticised the applicant's case for the interdict saying that the applicant's failure to tender an undertaking to Gary Player Stud Farm and Blair Atholl Farm to pay their damages should it eventually transpire that its claim for the interdict was not warranted is a serious defect in its case.

(21) There is no dispute that in suitable circumstances a person with a prospective claim who has reason to fear that his opponent will dissipate its assets with the intention to render a successful judgment, eventually obtained, hollow is entitled to an interdict.[2] In this case it is not necessary to deal with the requirements for such an interdict because it is clear on the papers that the first respondent claims to be insolvent and that there are no prospects of effective execution of a judgment debt unless the corporate veil is pierced. There is an extremely strong likelihood that a court will find that the first respondent used Ben Nevis and Metlika as tools to stay in the country and to avoid the payment of income tax and that the assets of some or all of those entities are in fact the assets of the first respondent. I cannot but agree with a submission by Mr. Puckrin namely that the first respondent will take umbrage at being called an insolvent when he flies at 40 000 feet above the ground, in his private aircraft, reading the time on his golden wrist watch[3], on his way from either the family home

[2] Knox D=Arcy and Others v Jamieson and Others, 1994(3) S A 700 (W) at 706 F-H and Knox D=Arcy and Others v Jamieson and Others, supra (in footnote 1) at 372-373.

[3] When the sheriff tried to execute on the deemed judgment of R16 million the first respondent informed him that even his wrist watch and golf clubs belong to Talacar.

or the holiday home for a game of golf at one of his exclusive golf clubs i.e. Fancourt or Leopard Creek. There can be no doubt that this is a case where a court will grant an interdict.

(22) The first respondent contends that the *ex parte* order is to be set aside. The first argument is that an applicant like the present applicant is obliged to make a full and frank disclosure of all matters in his knowledge, which are material for the judge to know. Reliance is placed on the speech of Lord Denning in *Third Chandris Shipping Corporation and Others v Unimarine SA*[4]. The argument is that the applicant was not frank with the court in that it failed to disclose that the inquiry was still pending and that it had lulled the first respondent into the belief that no assessment would be issued before the applicant had studied the record, considered further information which would be required of him and the inquiry was finalised. I was referred to the record of the inquiry. At pp. 470-474 the following transpired: After the questioning of the first respondent, on behalf of the applicant, came to an end Mr. Levin indicated that he did not intend to ask questions at that stage as they wanted to compare their notes to the record (?) and to look at further documents required and supplied. The presiding officer then suggested that it would not be necessary to reconvene, whereupon Mr. Levin indicated that it was for the presiding officer to direct how he wanted to get the information and that a mechanism was to be set up for the supply thereof. Mr. Van der Merwe on behalf of the applicant then suggested that the first respondent's attorney was to supply the information to his attorney and that he would then communicate with Mr. Levin if there would be a need for further enquiries. Mr. Levin thereupon tried to arrange a time schedule and asked Mr Van der Merwe for a date by which they would submit their list for information and documentation. He also expressed a belief that the record would be available by 8

[4] {1979} All E R 972 at 984g

February. Mr Van der Merwe then said that he wanted to make it clear that he cannot bind the applicant to anything but that they want to have the information as soon as possible and that it should have been supplied already. Thereafter Mr. Van der Merwe is recorded as having said:

> *"And the Commissioner reserves all his rights, so we are not binding ourselves to any time periods. The Commissioner may decide to issue assessments or summonses and so I can't bind him. We will go back and study the record, together with all the information as and when it becomes available. So, I would call upon you to make it available to the Commissioner."*

Thereafter Mr. Levin expressed a concern as to the adequacy of his notes in respect of the required information. The first respondent indicated that he would be overseas until 10 February. There was further talk and *inter alia* a suggestion by Mr. Levin that the matter be postponed *sine die* Mr. Van der Merwe took note of the first respondent's positive attitude in respect of the making available of information. On behalf of the first respondent an offer to meet with representatives of the applicant was made but was countered by an indication that the information was required in writing, whereupon the presiding officer adjourned *sine die*.

(23) The argument on behalf of the first respondent is that from the aforegoing it is clear that the first respondent was treated administratively unfairly in that the applicant did not wait for the further information and issued the assessments before his reserved right to re-examine was exercised. The argument goes further that when the *ex parte* application was brought these facts were to be disclosed to the court. I am not persuaded by that argument. My reading of the abovementioned portion of the record is to the effect that it was uncertain if the hearing would be resumed and that the right of the applicant to issue assessments and summonses was

specifically reserved. In my view there was nothing further which had to be disclosed to the court. After all the record was an annexure to the application.

(24) The second argument is that the application is defective in that the applicant did not require of the first respondent to supply it with an undertaking along the lines of the *interim* order. In its founding affidavit it was disclosed to the court that the two assessments were issued. It was specifically stated that the applicant feared that assets could be removed if the first respondent heard about the assessments. An observation by Lord Denning in the *Chandris*[5] matter seems extremely apposite:

> *"But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva injunction granted against them."*

There was no reason for the applicant to require undertakings from the first respondent. On the contrary it would have been foolish to do so.

(25) As to the contention that it is for an applicant asking for an interdict of this nature to tender an undertaking to pay damages if eventually it is found that it was not entitled to the interdict, it would be wrong to generalise. There may very well be cases where it may be impossible

[5] *Supra* at p. 985

for an applicant to tender such an undertaking[6] and where insistence upon one may effectively non-suit a good claimant. It is an aspect which has to be decided from case to case. All things being equal it seems to me that it is for the applicant to make out a case that it is not to give such an undertaking. After all the applicant claims the interdict at a stage when the respondent's case is not known to the court. I was referred to the matter of *Hoffman-La Roche & Co A G and Others vSecretary of State for Trade and Industry*[7] and invited to find that in a case such as the present, where a State official is trying to secure income for the State, the State is not to be pressured into giving such an undertaking. The reason for the giving of an undertaking is to establish liability by the applicant despite the fact that the inroad in the affairs of the opponent was authorised by an order of court.[8] Section 33 of the Constitution, Act 108 of 1996 provides for just administrative action. There cannot be a compelling reason why, in the light thereof, the State must be protected if a state official misconstrues the situation and causes damages to someone where a private concern would have been liable for such damages. In any event the situation in the *Hoffman-La Roche* matter is materially different from the circumstances of this case. In that case the State was enforcing legislation, whereas in this case the State is trying to recover a debt. Mr. Van der Merwe pressed hard for an unconditional order in this respect but agreed, reluctantly, that rather than to set the *ex parte* order aside an undertaking by the applicant could be noted. Despite this adverse finding, on the whole I am satisfied that the applicant was entitled to apply for the *ex parte* order. The rule, as modified, by the agreement in respect of the guarantee and amplified by the applicant's undertaking to pay damages is therefore to be confirmed. In respect of many of the issues the agreement superseded the rule. If effect is given to the agreement the interdict will be substituted by the guarantee, and if the applicant is successful in its action to pierce the corporate veil the applicant w ill only be entitled to payment for such taxes as are owing by the first respondent and Ben Nevis out of the

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[6] See the matter of *Allen and Others v Jambo Holdings Ltd and Others,* {1980}2 All E R 502 at 505.

[7] {1974} 2 All E R 1128

[8] See in this regard the observations in *Knox D'Arcy v Jamieson,* 1996 (4) S A 348 (A) at 379 H-380B.

guarantee. In terms of the agreement the first respondent and his wife accepted that the interdict prohibiting them from alienating or encumbering their personal interests in the other respondents was to remain in force. That portion of the rule is therefore to be confirmed. It will further be necessary to provide specifically in the order that if the final guarantee does not come into existence the original attachment shall again come into place. The undertaking, which is to be prospective as from date of the final order, is also to be taken up in such order.

(26) The effect of the *ex parte* order was also to restrict the third parties involved in Gary Player Stud Farm and Blair Atholl Farm in the handling of their own affairs. Although in the case of Gary Player Stud Farm the applicant attempted to formulate the order so as not to interfere with the underlying activities of the company it did not even do so in the case of Blair Atholl Farm. The Player family is a 50% shareholder therein and yet the order prohibited the company from paying dividends or director's remuneration to, for instance, Mr. Player. When this was pointed out to the applicant it insisted on security. The applicant has now seen the light and agrees that the underlying assets of the tenth and the fifteenth respondents are not to be covered by the interdict. There is no doubt that they were dragged into court by the initial attitude of the applicant as well as its refusal to give an undertaking to pay damages. In my view there is no reason why on this aspect the ordinary rule that costs follow the result shall not be applied.

(27) As is evident from the different steps taken by the parties after the assessments were issued there is a potential of protracted litigation. Properly handled, counsel can keep each other in business for a long time. It is obvious that the main reason for the feverish bringing of applications and counter-applications is the applicant's desire to sequestrate the estate of the first respondent and his corresponding desire not to be so sequestrated. From the respondent's point of view there must be an added advantage to indulge in litigation about the propriety of the applicant's actions, the constitutionality of section 150(5) of the Insolvency Act, the proper interpretation of section 91(1)(b) and 91(1)(c) read with section 92 of the Act and the question if section 91(1) (c) is not unconstitutional if the effect thereof

is that a person can be sequestrated on a deemed debt. It can defer the real issue between the parties i.e. if the first respondent and Ben Nevis are liable to pay tax, and if so, in what amount, for a long time. As a result thereof I indicated during argument that if possible I shall set aside the provisional order of sequestration so that the real issues can be addressed and the matter finalised. I have now had the benefit of a full argument and the matter crystalized out as follows:

(28) The applicant claims to have a liquid debt for more than R100 in terms of section 9(1) of the Insolvency Act. Initially it relied on the certificate filed in terms of section 91(1)(b) of the Act. It is the first respondent's contention that the certificate is not a valid document for the purposes of sequestration. There are a number of objections against the statement. In the first place it is contended that it is dependent upon the validity of the assessment. It is contended that the assessment itself is void and ought to be reviewed and set aside. The first respondent relies on the judgment in *Metcash Trading Ltd v Commissioner SARS and Another*[9] for the proposition that the court's powers to review the applicants decision to issue assessments are not ousted by section 88 of the Act. The argument is that if the assessment is set aside, there is no basis for the statement and the applicant accordingly does not have a liquid debt on which to rely in order to sequestrate the first respondent. It is further contended that the statement provides for a deemed debt. It is argued that sequestration involves impairment of some of the entrenched rights in terms of the bill of rights, for example the right as to dignity. The argument continues that fundamental rights ought not to be impaired by a deemed debt. The argument is that section 91(1) and section 92[10] of the Act must, if possible, be construed not to have that effect. It is then argued that the correct interpretation is that section 92 only refers to section 91(1)(b) and not to 91(1)(c). There is a further

[9] 2001 (1) S A 1109 paragraph 46

[10] Section 91(1)(b) provides that a statement can be filed and will have the effect of a civil judgment. Section 91(1)(c) empowers the applicant to bring an application for the sequestration of the estate of a taxpayer and section 92 provides that the taxpayer is not entitled to question the correctness of the statement in civil proceedings.

argument that if section 92 also refers to section 91(1)(c) then it is unconstitutional, as it impairs the fundamental rights of the individual, and ought te be declared unconstitutional.

(29) In my view the answer to all these arguments is that the first respondent admitted to be liable to taxation at the prescribed rate on the living expenses. It is clear that he omitted to include those expenses as a non-taxable accrual in his return. The applicant must impose the 200% penalty and must add the interest to the taxable amount[11] unless he is satisfied that the omission was not intentional. It is highly improbable that any tribunal will ever find that the omission was anything else than a deliberate attempt to evade taxation. Those amounts are liquid. It is so that the basic premise on behalf of the first respondent is that he denies being taxable on the living expenses and that he accordingly denies being taxable in respect of the penalties and interest. On the papers before me it is unlikely that he will be found not to be taxable on the living expenses and it follows that the assessment for the penalties and interest will stand. In my view the judgment in *Meskin v Amod*[12] is authority for the proposition that a court in its discretion may accept a disputed debt as sufficient for the purposes of section 10 of the Insolvency Act if the probabilities are so strongly in favour of the applicant that it is highly unlikely that the defence will succeed. Although in that case the respondent, against whom a provisional judgment had been given, defended the principal case Holmes J with whom Howard J agreed found the probabilities against the respondent so strong that they exercised their discretion in terms of section 10 in favour of the applicant. A provisional order of sequestration was granted. I am satisfied that the applicant is a creditor of the first respondent for more than R100 in terms of section 10 of the Insolvency Act.

(30) The respondent has committed an act of insolvency in that he indicated to the sheriff that he is unable to pay his debt to the applicant. As I have already indicated he was quite boastful

[11] Section 76(1)(c) and section 89*quat* of the Act

[12] 1956 (3) S A 120 (N) at 122 D-E.

that he owns nothing. Moreover is was conceded by his counsel that on his affidavits and testimony at the inquiry he is in fact insolvent.

(31) It was hotly debated if there will be an advantage to creditors if the first respondents estate is sequestrated. The applicant maintains that it is legitimate for a creditor to take insolvency proceedings to obtain payment of his debt[13]. It is a further submission that the application had the effect of getting the first respondent to pay the R4,3 million and that a final order may just induce him to pay the further R12 million. It is pointed out that the first respondent is actually in a position to pay if forced to do so and that he is just stubborn. A further argument is that the trustee may go overseas in order to trace assets. In the light of the advice that it will be well-nigh impossible to execute on tax debts in the Virgin Islands and in view of what was said by Lord Denning in the *Chandris* matter[14] I have serious doubts if a visit by the trustee to Scotland or Guernsey will produce money for the applicant. On behalf of the first respondent it was argued that the applicant is the only creditor and that it has extensive powers in terms of sections 69 and 74 of the Act. The impression which I have is that the first respondent is set to fight the applicant on every single aspect and to prolong the proceedings. Although the applicant was perfectly entitled to apply for the first respondent's sequestration the matter will in my view be finalised much sooner and easier if the provisional order for sequestration is set aside and the applicant deals with the first respondents objections to the assessments and have the matter heard before a special Income Tax Court.

(31) This judgment must not be understood as an indication that the grant of the provisional order by Shongwe J was not correct. On the contrary at that stage that was the correct order. At present however the situation has changed drastically. If the provisional order is set aside a number of matters will disappear. The application for the review of the assessments will no

[13] *Estate Logie v Priest* , 1926 A D 312 at 319

[14] See paragraph 24 above

longer be necessary. The appeal against the judgment of de Vos J will become unnecessary. The question if a provisional order of sequestration is appealable and if section 150(5) of the Insolvency Act is unconstitutional or not will fall away. The applicants rule 30 application will fall away. Even if all the requirements for an order of sequestration have been met, as in this case, a court has a residual discretion not to sequestrate the respondent[15]. I am of the view that I must exercise my discretion against the confirmation of the rule in order to protect the parties against themselves. It must not be interpreted as substantial success for the first respondent. I make the order to cut out a lot of unnecessary and academic litigation and to speed up the endeavours of the applicant to get a little tax out of the first respondent.

(32) It became obvious that the De Beer application, which was also postponed to be heard simultaneously with the other applications, had become academic because in case of a confirmation or setting aside of the provisional order the basis for de Beer's application would cease to exist. The estate would either become subject to a final sequestration order or the estate would be released from the provisional order. De Beer asked for an order of costs against the first respondent on the basis that he had a statutory duty to fulfill, that the respondent failed to co-operate with him and that he was obliged to get clarity as to his position. The first respondent argues that de Beer knew that he intended to appeal against the provisional order and that by bringing the application he was the author of his own dilemma. De Beer found himself in a difficult position. He had a duty to fulfill and the first respondent would just not do anything to assist him. The fact that the first respondent did not acquiesce in the provisional order was not of his making. There was in any event nothing which prohibited the first respondent to give de Beer an audience and to supply him with information. He ought to have foreseen that by acting the way he did he would force De Beer to take action. The first respondent has to pay de Beers costs, inclusive of the costs of two counsel.

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[15] *Millward v Glaser* , 1950 (3) S A 547 (W) at 553G-554D

(33) The parties are agreed that the costs of the *ex parte* application are to be reserved for decision by the court hearing the applicants action against the first respondent, Ben Nevis and Metlika for the piercing of the corporate veil. I have decided to reserve all the other costs also for decision by that court. Without trying to influence that court I may indicate that I would have regarded the success or not of the parties to that action as a yardstick to decide the question of the reserved costs.

The following order is made:

1. In matter number 4745/02 (The *ex parte* application)
    1.1. The rule *nisi* against the first and the fourth respondents is confirmed.
    1.2. It is confirmed that the agreement which was made an order of court on 30 April 2002 will regulate the position pending finalisation of the present disputes between the parties.
    1.3 If the final guarantee provided for in the aforesaid agreement does not come into place, as agreed, the attachment of the assets, which were released on the strength of the guarantee, will revive.
    1.4 It is recorded that the applicant undertook to abide by any order for the payment of damages, suffered as a result of the of the interim order, which the court may make in favour of any of any of the respondents, if it is established that the applicant was not entitled to such an order.
    1.5. The applicant is to pay the costs of opposition of the tenth and fifteenth respondents, which costs will include the costs of two counsel.
2. In matter number 14280/02 (The application for sequestration)
    2.1. The provisional order of sequestration is set aside
3 In matter number 17091/02 (The De Beer application)
    3.1 The first respondent is ordered to pay the applicant's costs, which costs are to include the costs of two counsel.

4. In matters 14280/02 (The rule 30 application) and 12508/02 (The review application.)

4.1. No order is made save as is provided in 5 hereunder.

5 In all the aforesaid matters

5.1 All the remaining issues as to costs are reserved for determination by the court hearing the action between the applicant and the first-, second- and third respondents for the piercing of the corporate veil between the respondents.

W J HARTZENBERG

REGTER VAN DIE HOOGGEREGSHOF